In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1401

CITY OF WILLIAMSPORT, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission jointly move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment and decision of a three-judge district court (J.S. 3a–9a) dismissing appellants' suit to set aside a report and orders of the Interstate Commerce Commission (J.S. 10a–43a) which required the Pennsylvania Railroad Company to continue operating passenger trains 570 and 571 between Harrisburg, Pa. and Baltimore, Md.

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(the southern segment), but permitted the discontinuance of the operation of those trains between Harrisburg, Pa. and Buffalo, N.Y. (the northern segment).

In December 1966, the railroad filed notice pursuant to Section 13a(1) of the Interstate Commerce Act (49 U.S.C. 13a(1)) (J.S. 1a–2a) proposing the complete discontinuance of trains 570 and 571 operating between Baltimore, Md. and Buffalo, N.Y. The Commission instituted an investigation and, after hearings held in Harrisburg and Williamsport, Pa., Olean and Buffalo, N.Y., and Washington, D.C., found that continued operation of the northern segment was not required by the public convenience and necessity and would unduly burden interstate commerce.[1] Contrary findings were made as to the southern segment and the railroad was ordered to continue the operation of that segment for one year.

Appellants brought the present action to annul and set aside the Commission's orders, asserting on various ground that the Commission was powerless to require a partial continuance where the railroad's notice proposed a complete discontinuance, but was obligated to make findings and issue an order requiring continuance (or permitting discontinuance) as to the operation of the trains in their entirety. The court below unanimously sustained the Commission's decision, holding that the Commission is not limited by

[1] The operation of the northern segment was discontinued in August 1967, when the court below declined to extend the temporary restraining order it had previously entered, finding that appellants had failed to establish irreparable injury.

the railroad's original notice, but may order a partial continuance where a complete discontinuance is sought, and that the Commission's action was supported by its findings.

ARGUMENT

This appeal presents no substantial question warranting plenary review by this Court. Whatever the regulatory problems in train discontinuance cases—and there are many—they are not presented here. This case involves only the question whether the Commission is so bound to the railroad's notice that it cannot require continuance of part of the operation sought to be discontinued. The court below noted that the Act specifically contemplates an order requiring continuance "in whole or in part"; and properly gave great weight to a pattern of consistent—and virtually contemporaneous—administrative interpretation serving as precedent for the result reached here.[2] As the court stated (J.S. 7a), appellants' theory that the Commission is restricted by the scope of the discontinuance sought in the original notice and cannot order a partial continuance—

> * * * would place the Commission in an administrative strait-jacket and would not comport with the statutory purpose. Its effect would be to penalize the railroad for seeking

[2] See *New York Central R. Co. Discontinuance of Service*, 307 I.C.C. 167, 171 (1959); *Louisville & Nashville R. Co. Discontinuance of Service*, 307 I.C.C. 173, 186 (1959); *Chicago, M., St. P. & P. R. Co. Discontinuance of Passenger Train Service*, 317 I.C.C. 691, 715–716 (1961); *Boston & Maine Corp. Discontinuance of Passenger Train Service*, 324 I.C.C. 418, 445–446 (1965).

> to discontinue more of the operation than the Commission ultimately decided it was proper to do. There is nothing in the statute or legislative history suggesting such a limitation. * * *

No different result is required merely because, as here, a slight profit as a whole might have been shown through attribution of "feeder" revenue,[3] since such a showing, by itself, would not have compelled the ultimate findings that the continued operation of the trains in their entirety was required by the public convenience and necessity and would not unduly burden interstate commerce. It is undisputed that the northern segment operated at a loss of some $233,000, and the statute explicitly authorizes a continuance "in part" without any requirement as to the "whole." This is consistent with prior decisions in rail abandonment cases. *E.g., State of North Carolina* v. *United States,* 124 F. Supp. 529 (M.D.N.C., 1954), sustaining *Norfolk S. Ry. Co. Abandonment,* 290 I.C.C. 268; *State of Georgia* v. *United States,* 28 F. Supp. 749, 752 (E.D. Va., 1939). Moreover, the fact that an entire train may show a profit does not preclude discontinuance, even as to the whole. *People of the State of California* v. *United States,* 258 F. Supp. 950 (N.D. Calif., 1966). There is thus no reason for the agency to make needless findings as to the whole train, where, as here, it is apparent in the course of examining the entire operation that one segment is not heavily patronized, loses money under any view, and is clearly severable. Finally, there are but few cases involving

[3] Feeder revenue is a portion of revenue earned by other trains of the carrier connecting with the train in issue.

an unprofitable segment of a train arguably profitable as a whole wherein the railroad seeks a complete discontinuance; the situation is unlikely to recur with any frequency.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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